

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

34-3

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1179

United States Court of Appeals
for the District of Columbia Circuit.

FILED NOV 7 1977

GEORGE A. FISHER
CLERK

AMERICAN NUMISMATIC ASSOCIATION,

Appellant.

v.

RICHARD PICKER,

Appellee.

APPELLANT'S PETITION FOR REHEARING
AND/OR SUGGESTION
OF REHEARING IN BANC

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CONCISE STATEMENT OF ISSUE
AND ITS IMPORTANCE

The issue herein is whether an attendant at a convention who does not pay for the use of a storage room can — upon a loss of the goods he stored — charge the convention with simple negligence rather than gross negligence.

The importance of this decision is that it is in conflict with the law of this jurisdiction as previously established in the case of *Barclay v. Maxfield*, 48 A. 2d 768. This change of the law in this jurisdiction is beyond the jurisdiction of this Court since the District of Columbia Court Reform and Criminal

Procedure Act of 1970 which established the District of Columbia Court of Appeals as the court of highest jurisdiction for the District.

A secondary issue herein is whether, under the circumstances of this case, there has been a denial of due process by the summary treatment of this appeal by this Court and the denial to appellant of the traditional right of oral argument.

POINTS OF LAW AND FACT WHICH
THE COURT HAS MISAPPREHENDED

Appellant respectfully refers this Honorable Court to the judgment of the Court filed on October 25, 1977, which states that the issue of whether the appellant was a gratuitous bailee was previously decided against the appellant in the first trial of this case and affirmed by the previous decision herein, *Picker v. Searcher's Detective Agency*, 515 F.2d 1316. This is an error both in fact and in law. This case involves the loss of articles stored in a security room at a numismatic convention. At the first trial, the trial court *as a matter of law* ruled that a release of liability which had been signed by the appellee in his application for a display table limited the liability of the appellant to gross negligence. Under the circumstances, there never was an issue of whether or not the bailment was gratuitous since the case went off only on the issue of whether there was gross negligence in view of the release. The decision and opinion by this Court on the appeal clearly reflects that the propriety of the limitation of liability pursuant to the release was the only question before the Court. The decision at this time to the effect that there was an adverse ruling at the trial level in the first trial on the issue of gratuitous bailment is therefore totally incorrect. Appellant submits that this misapprehension by the Court and the resultant belief that this is, therefore, a frivolous appeal have seriously affected the Court's attitude toward this appeal and its decision.

The Court, in the judgment of October 25th, has further stated that the facts show that "appellant was clearly not a gratuitous bailee." This constitutes

a misapprehension both in fact and in law. The evidence showed that the appellee paid a fee for the right to have a display table at the convention. The application for such display table disclosed a fee of \$250.00 would be charged, \$20.00 of which was refundable. It further clearly spelled out that the fee covered the use of a table, two exhibit cases with locks, a dealer's sign, a registration with a name badge, and a ticket to the banquet. Nowhere was there any statement or indication that the \$250.00 charge included a charge for use of the storage room. The evidence further disclosed that all persons attending the convention, whether they had display tables or not, were entitled to the use of the storage room — security room — and that there was no charge to anyone for the use of such room no matter how frequently or infrequently he used the same. The claim ticket given to persons storing articles further spelled out clearly that there was no charge for the use of the room. In view of the foregoing, it is apparent that there is no basis in law or in fact for the judgment of this Court that "appellant was clearly not a gratuitous bailee".

Under the circumstances, this Court by this decision is changing the law of this jurisdiction with regard to the liability and responsibility of a party who provides storage space without a charge for the same. That law has previously been established in the case of *Barclay v. Maxfield*, 48 A.2d 768.

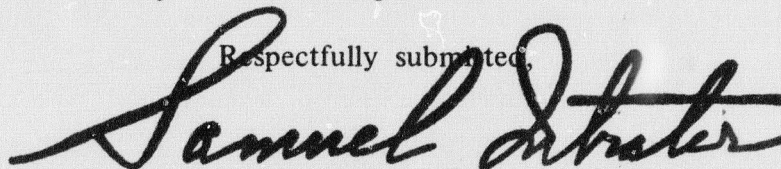
This Court, therefore, is in fact changing the law previously established in this jurisdiction with regard to bailment.

Appellant respectfully refers this Honorable Court to the fact that since the effective date of the District of Columbia Court Reform Act, the highest appellate court with regard to the substantive law of the District of Columbia is now the District of Columbia Court of Appeals rather than this Honorable Court. That under such circumstances a ruling of this Court which in effect changes or attempts to change the law of the District of Columbia is really beyond this Court's jurisdiction. If the decision herein is not considered as an attempt to change the law, at the very least it constitutes a refusal to apply such law.

Finally, appellant respectfully suggests that the summary treatment of this appeal by this Court has in fact acted as a denial of due process to the appellant. This case involves a judgment of over \$100,000.00 against an eleemosynary institution. The case was first submitted to a jury on the grounds that the release signed by the appellee — an educated man — relieved the appellant herein of responsibility for anything less than gross negligence. This Court in a complicated decision reversed so that the jury should reconsider whether “it was reasonably brought home” to the appellee the significance of his release. Such new jury came back with a verdict opposite to that entered by the first jury and granted a verdict in favor of the appellee. At this time, the issue was presented to the Court that since the bailment was gratuitous, no payment or charge whatsoever being exacted for the use of the security room, the issue of ordinary negligence was not appropriate for the jury and a directed verdict should have been granted.

Appellant respectfully submits that these are legitimate and important questions and should not have been given short shrift by this Court. Instead, acting upon misconceptions of the law and fact as set forth above, this Court refused to allow oral argument — at which time the mistaken conception of the case could have been cleared up by counsel — and without such argument promptly issued its judgment affirming the judgment of the United States District Court. Appellant respectfully submits that justice has not been effectuated herein and requests a rehearing en banc.

Respectfully submitted,

A large, stylized handwritten signature in black ink, reading "Samuel Intrater". The signature is written in a cursive, flowing style with prominent loops and flourishes.

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Copy of the foregoing Petition and Suggestion mailed this 4th day
of November, 1977, to John H. C. Barron, Jr., Esquire,
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Samuel J. Baker

James Smith

